

A **CHARLES KOO HO-TUNG & ORS v. KOO LIN SHEN & ORS**

HIGH COURT MALAYA, KUALA LUMPUR
WONG KIAN KHEONG JC
[ORIGINATING SUMMONS NO: 24NCC-296-08-2014]
1 OCTOBER 2015

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***CIVIL PROCEDURE:** Affidavits – Cross-examination of deponents – Application for – Whether made in good faith – Whether applicants estopped from proceeding with application – Whether there was excessive delay in filing application – Mandatory duty to file interlocutory applications expeditiously during pre-trial case management – Whether breached – Whether court could exercise judicial discretion to grant application – Rules of Court 2012, O. 28 r. 4(2), O. 34 r. 9(1) & (2), O. 59 r. 7(1)*

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In an originating summons ('OS'), the plaintiffs applied *vide* encl. 29 ('court encl. 29') for leave of this court to cross-examine the first defendant ('the first cross-examination application') on affidavits affirmed by him. Court encl. 29 was vigorously opposed by the first defendant as well as the second, third, fourth and sixth defendants. On 15 May 2015, the court allowed court encl. 29. Subsequently, the second to fourth and sixth defendants filed an application *vide* court encl. no. 91 ('court encl. 91') for leave of this court to cross-examine the first plaintiff, the third plaintiff, one Moy and one Henry ('the four deponents') on affidavits affirmed by them ('the second cross-examination application'). The second to fourth and sixth defendants contended that the same considerations warranting the cross-examination of the first defendant ought to warrant the cross-examination of the four deponents. The issues that arose were (i) whether the second cross-examination application was made in good faith; (ii) whether the applicants of the second cross-examination application were estopped from filing the second cross-examination application based on their affidavits and conduct in opposing the first cross-examination application; and (iii) whether there was unexplained and excessive delay in filing the second cross-examination application.

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Held (dismissing court encl. 91 with costs):

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(1) If the second to fourth and sixth defendants had genuinely wished to cross-examine the four deponents, they should have filed an application to cross-examine the four deponents upon receipt of court encl. 29. This was however not done. Court encl. 91 was not filed on relevant considerations but was instead filed by the second to fourth and sixth defendants as a 'tactical countermeasure' to delay specifically the enforcement of the decision dated 15 May 2015 and generally the disposal of the OS. Court encl. 91 had been made by the second to fourth and sixth defendants for improper and/or collateral purposes. Court encl. 91 had not been filed in good faith and on this ground alone, court encl. 91 should be dismissed. (para 10)

- (2) Immediately after the decision dated 15 May 2015 had been pronounced in court, the first to fourth and sixth defendants orally applied to stay the effect of the decision ('oral stay application') pending an appeal by the second to fourth and sixth defendants to the Court of Appeal against the decision dated 15 May 2015 ('appeal against decision'). If there was good faith on the part of the second to fourth and sixth defendants in filing court encl. 91, the second to fourth and sixth defendants would not have made the oral stay application. Such an instruction would have been given prior to the decision dated 15 May 2015. Further, the fact that the second to fourth and sixth defendants had filed the appeal against decision dated 15 May 2015 and yet subsequently filed court encl. 91 and proceeded with the appeal against decision, showed a lack of *bona fides* on the part of the second to fourth and sixth defendants in making court encl. 91. Based on these reasons, the second to fourth and sixth defendants were estopped from proceeding with court encl. 91 in view of their conduct. (paras 10 & 13)
- (3) The OS had been filed on 15 August 2014. By filing court encl. 91 on 19 June 2015, the delay of more than ten months from the date of the filing of the OS, the second to fourth and sixth defendants had breached the mandatory duty imposed by O. 34 r. 9(1) and (2) of the Rules of Court 2012 ('RC') to file expeditiously all interlocutory applications during pre-trial case management. Court encl. 29 was filed on 19 December 2014. The second to fourth and sixth defendants could have easily 'tagged along' court encl. 29 and file an application to cross-examine the four deponents. Instead, the second to fourth and sixth defendants embarked on a vigorous opposition to court encl. 29 and only filed court encl. 91 after the decision dated 15 May 2015 went against them. Such an intentional and excessive delay on the part of the second to fourth and sixth defendants was contrary to a just, expeditious and economical disposal of the OS as mandated by O. 28 r. 4(2) of the RC. Hence, the second to fourth and sixth defendants were unable to discharge their legal burden to persuade this court to exercise judicial discretion to grant court encl. 91. (paras 16 & 25)
- (4) As a general rule, costs of interlocutory proceedings shall only be paid at the conclusion of the proceedings unless the court orders costs to be paid forthwith ('exception'). Order 59 r. 7(1) of the RC does not prescribe the circumstances for the application of the exception. The court's discretion to invoke the exception was unfettered and needless to say, the exercise of such discretion was based purely on the particular facts of the case in question. In view of the inference that court encl. 91 had been filed without good faith for an improper and/or collateral purpose, this court exercised its discretion under O. 59 r. 7(1) of the RC to order costs of court encl. 91 to be paid forthwith by the second to fourth and sixth defendants to the plaintiffs notwithstanding that the OS had yet to be concluded. (paras 33 & 34)

A Case(s) referred to:

Blue Valley Plantation Bhd v. Periasamy Kuppannan & Ors [2011] 5 CLJ 481 FC (*refd*)
Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Bhd [1995] 4 CLJ 283 FC (*refd*)

Charles Koo Ho-Tung & Ors v. Koo Lin Shen & Ors [2015] 1 LNS 755 HC (*refd*)
Dato' Abdullah Hishan Mohd Hashim v. Sharma Kumari Shukla (No 2) [1999] 4 CLJ 184 HC (*refd*)

Drilltech Oilfield Services Ltd & Anor v. Witech Sdn Bhd [2003] 1 LNS 339 HC (*refd*)
Emporium Jaya (Bentong) Sdn Bhd (In Liquidation) v. Emporium Jaya (Jerantut) Sdn Bhd (No 2) [2002] 6 CLJ 418 HC (*refd*)

Hai Yue Hin v. Public Feedmill (M) Sdn Bhd [1997] 4 CLJ 555 CA (*refd*)
HSBC Bank Malaysia Bhd v. Macquarie Technologies (Malaysia) Sdn Bhd & Another Appeal [2004] 3 CLJ 121 CA (*refd*)

Indrani Rajaratnam & Ors v. Fairview Schools Bhd [2002] 1 CLJ 1 CA (*refd*)
Kumagai Gumi Co Ltd v. Zenecon-Kumagai Sdn Bhd & Ors and Another Application [1994] 1 LNS 73 HC (*refd*)

Langdale v. Danby [1982] 3 All ER 129 (*refd*)

Lee Ah Kong @ Lee Muk Sang v. Wings Logistic Sdn Bhd & Anor [2013] 1 LNS 1413 HC (*refd*)

Leisure & Allied Industries Pty Ltd v. Udaria Sdn Bhd [1979] 1 LNS 42 HC (*refd*)
M/s Harsh Wood Products Pvt Ltd v. Sant Prakash Gupta & Ors [1991] MPLJ 32 (*refd*)
PP v. Yap Min Woie [1995] 4 CLJ 692 FC (*refd*)

Skrine & Co v. MBf Capital Bhd & Anor And Other Appeals [1998] 3 CLJ 432 CA (*refd*)
Tetuan Kumar Jaspal Quah & Aishah v. The Co-Operative Central Bank Ltd [2007] 4 CLJ 487 CA (*refd*)

Legislation referred to:

Courts of Judicature Act 1964, s. 67(1)

Juvenile Courts Act 1947, ss. 12, 28

Rules of Court 2012, O. 1A, O. 2 r. 1(2), O. 28 r. 4(2), (3), (4), O. 34 r. 9(1), (2), O. 38 r. 2(2), O. 59 rr. 1(3), 7(1)

Rules of the High Court 1980, O. 59 r. 4(1)

Code of Civil Procedure 1908 [Ind], First Schedule, O. 19 r. 2

For the plaintiffs - Kumar Kanagasingam (Bahari Yeow, Yee Mei Ken & Ho Ai Ting with him); M/s Lee Hishammuddin Allen & Gledhill

For the 2nd to 4th & 6th defendants - S Sivaneindiran, (KL Pang, Puteri Shehnaz Majid & Sasha Ravindran with him); M/s Cheah Teh & Su

For the 5th defendant - Nor Emellia Mohd Shariff; M/s Arianti Dipendra Jeremiah

Reported by Suhainah Wahiduddin

JUDGMENT

Wong Kian Kheong JC:

Introduction

[1] This is a “peculiar” case wherein certain defendants have objected strenuously to the plaintiffs’ application to cross-examine one of the defendants in respect of his affidavits filed in the originating summons (first cross-examination application). After I have allowed the first cross-

examination application, the same defendants who objected to the first cross-examination application, filed their own application to cross-examine four deponents of affidavits filed on behalf of the plaintiffs (second cross-examination application). The sole issue that arises is whether I should exercise my discretion to allow the second cross-examination application on, among others, the three following grounds:

- (a) is the second cross-examination application made in good faith?;
- (b) are the applicants of the second cross-examination application estopped from filing the second cross-examination application based on their affidavits and conduct in opposing the first cross-examination application?; and/or
- (c) is there unexplained and excessive delay in filing the second cross-examination application?

First Cross-examination Application

[2] In this originating summons (OS), the plaintiffs (plaintiffs) have applied in court encl. no. 29 (court encl. no. 29) for leave of this court to cross-examine the first defendant (first defendant) on three affidavits affirmed by the first defendant.

[3] Court encl. no. 29 has been “vigorously” opposed by the first defendant, second to fourth and sixth defendants (second, third, fourth and sixth defendants).

[4] On 15 May 2015, I allowed court encl. no. 29 (decision dated 15 May 2015). The grounds for the decision dated 15 May 2015 can be found in [2015] 1 LNS 755; [2015] AMEJ 1047 and [2015] MLRHU 479 (*Charles Koo Ho Tung (No 1)*).

Second Cross-examination Application

[5] After the decision dated 15 May 2015, on 19 June 2015, the second to fourth and sixth defendants filed an application in court encl. no. 91 (court encl. no. 91). In court encl. no. 91, the second to fourth and sixth defendants applied for leave of this court to cross-examine the following deponents of affidavits:

- (a) the first plaintiff (first plaintiff) who affirmed six affidavits in this case;
- (b) the third plaintiff (third plaintiff), the deponent of two affidavits filed in the OS;
- (c) Ms Moy Sook Ching (Ms Moy) who affirmed four affidavits on behalf of the plaintiffs; and
- (d) Mr Koo Ho Liang Henry (Mr Henry Koo) who has affirmed one affidavit in this case.

In this judgment, I will refer to the first and third plaintiffs together with Ms Moy and Mr Henry Koo as the “four deponents”.

A Submission Of Second To Fourth And Sixth Defendants

- [6]** In support of court encl. no. 91, the second to fourth and sixth defendants have relied on my judgment in *Charles Koo Ho Tung (No 1)*. According to learned counsel for the second to fourth and sixth defendants, all the relevant factors taken into account by this court in allowing court encl. no. 29, have been fulfilled in respect of court encl. no. 91. As such, the second to fourth and sixth defendants contended that the “same considerations warranting the cross-examination of (first defendant) ought to warrant the cross-examination” of the four deponents. The considerations which support court encl. no. 91, according to the second to fourth and sixth defendants are as follows:
- B** (a) court encl. no. 91 is not in respect of an interlocutory matter but applies for leave to cross-examine the four deponents so as to assist this court to decide the OS on its merits;
 - D** (b) there is no evidence that court encl. no. 91 is filed:
 - (i) based on *mala fide*; or
 - (ii) for an improper or collateral purpose to:
 - E** (1) delay the hearing of the OS; or
 - (2) harass, intimidate and/or oppress the plaintiffs or the four deponents;
 - F** (c) the issues for the cross-examination of the four deponents have been sufficiently identified by the second to fourth and sixth defendants (identified issues);
 - G** (d) the identified issues are relevant to the OS;
 - (e) there is an acute conflict in the affidavit evidence regarding the identified issues in the sense that the truth of the affidavits of the four deponents has been challenged by the second to fourth and sixth defendants;
 - H** (f) the cross-examination of the four deponents will advance the cause of justice as:
 - (i) there is no contemporaneous documents in this case which will resolve the conflict in affidavit evidence regarding the identified issues; and
 - (ii) the affidavits of the four deponents which are lengthy and detailed, clearly show that the oral evidence of the four deponents will assist this court to decide justly the OS; and
 - I** (g) the second to fourth and sixth defendants have not been guilty of inordinate delay in filing court encl. no. 91 because:
 - (i) as at the date of filing court encl. no. 91, no hearing date has been scheduled for the OS; and

- (ii) this court has only allowed court encl. no. 29 on 15 May 2015 and court encl. no. 91 is only filed “just a month” after the decision dated 15 May 2015.

[7] The following cases have been cited by the second to fourth and sixth defendants to support court encl. no. 91:

- (a) *Leisure & Allied Industries Pty Ltd v. Udaria Sdn Bhd* [1979] 1 LNS 42; [1980] 1 MLJ 189;
- (b) *Emporium Jaya (Bentong) Sdn Bhd (In Liquidation) v. Emporium Jaya (Jerantut) Sdn Bhd (No 2)* [2002] 6 CLJ 418; [2002] 5 MLJ 675;
- (c) *Indrani Rajaratnam & Ors v. Fairview Schools Bhd* [2002] 1 CLJ 1; [2001] 4 MLJ 56;
- (d) *Tetuan Kumar Jaspal Quah & Aishah v. The Co-Operative Central Bank Ltd* [2007] 4 CLJ 487; [2007] 4 MLJ 638;
- (e) *Kumagai Gumi Co Ltd v. Zenecon-Kumagai Sdn Bhd & Ors and Another Application* [1994] 1 LNS 73; [1994] 2 MLJ 789;
- (f) *HSBC Bank Malaysia Bhd v. Macquarie Technologies (Malaysia) Sdn Bhd & Another Appeal* [2004] 3 CLJ 121 (*HSBC Bank’s case*);
- (g) *Lee Ah Kong @ Lee Muk Sang v. Wings Logistic Sdn Bhd & Anor* [2013] 1 LNS 1413; [2015] 7 MLJ 408; and
- (h) the judgment of KK Varma J in the Madhya Pradesh High Court case of *M/s Harsh Wood Products Pvt Ltd v. Sant Prakash Gupta & Ors* [1991] MPLJ 32.

Court’s Discretion To Order Cross-examination Of Deponent Of Affidavit

[8] In hearing an originating summons, the court has the discretionary power under O. 28 r. 4(3), (4) and O. 38 r. 2(2) of the Rules of Court 2012 (RC) to order the cross-examination of a deponent of an affidavit. I reproduce O. 28 r. 4 and O. 38 r. 2 RC as follows:

Directions by Court

Order 28 rule 4

- (1) The Court hearing an originating summons may, if the liability of the defendant to the plaintiff in respect of any claim made by the plaintiff is established, make such order in favour of the plaintiff as the nature of the case may require, but where the Court makes an order under this paragraph against a defendant who does not appear at the hearing, the Court, if satisfied that it is just to do so, may rehear the originating summons.
- (2) *Unless on the first hearing of an originating summons the Court disposes of the originating summons altogether or orders the cause or matter begun by it to be transferred to a Subordinate Court or makes an order under rule 8, the*

- A Court shall give such directions as to the further conduct of the proceedings as it thinks best adapted to secure the just, expeditious and economical disposal thereof.
- B (3) Without prejudice to the generality of paragraph (2), the Court shall, at as early a stage of the proceedings on the originating summons as appears to it to be practicable, consider whether there is or may be a dispute as to fact and whether the just, expeditious and economical disposal of the proceedings can accordingly best be secured by hearing the originating summons on oral evidence or mainly on oral evidence and, if it thinks fit, may order that no further evidence shall be filed and that the originating summons shall be heard on oral evidence or partly on oral evidence and partly on affidavit evidence, with or without cross-examination of any of the deponents, as it may direct.
- C (4) Without prejudice to the generality of paragraph (2), and subject to paragraph (3), the Court may give directions as to the filing of evidence and as to the attendance of deponents for cross-examination and any other directions.
- D Evidence by witness statement
Order 38 rule 2
- E (1) Without prejudice to the generality of rule 1, and unless otherwise provided by any written law or by these Rules, at the trial of an action commenced by writ, evidence-in-chief of a witness shall be given by way of witness statement and, unless the Court otherwise orders or the parties to the action otherwise agree and subject to such directions as the Court may make, such a witness shall attend trial for cross-examination and, in default of his attendance, his witness statement shall not be received in evidence except with the leave of the Court.
- F (2) In any cause or matter begun by originating summons and on any application made by notice of application, evidence shall be given by affidavit unless in the case of any such cause, matter or application any provision of these Rules otherwise provides or the Court otherwise directs, but the Court may, on the application of any party, order the attendance for cross-examination of the person making any such affidavit, and where, after such an order has been made, the person in question does not attend, his affidavit shall not be used as evidence without the leave of the Court.
- G (3) Notwithstanding paragraph (1) or (2), the Court may, if it thinks just, order that evidence of a party or any witness or any part of such evidence be given otherwise than by witness statement at the trial or hearing of any cause or matter.
- H (4) Unless otherwise ordered by the Court, a witness statement must be filed in Court and served on the other parties to the action not less than seven days before it is to be tendered and read at the trial.
- I (emphasis added)

[9] My decision in respect of court encl. no. 29 in *Charles Koo Ho Tung (No 1)* has been affirmed by the Court of Appeal. In *Charles Koo Ho Tung (No 1)*, at paras. 54-58, I have decided as follows:

54. Before I discuss the merits of Court Enc. No. 29, I will state my own understanding of Malaysian cases in respect of the exercise of the court's discretionary power to order or refuse cross-examination of a deponent of an affidavit.

55. *Firstly, whether the court exercises its discretion to allow or not the cross-examination of a deponent in a particular case, is dependent on the particular facts of that case. As such, judgments on the issue of cross-examination of deponents, in my view, are purely illustrative and are not binding legal precedents from the view point of the stare decisis doctrine.* I cite Mahadev Shankar JCA's judgment in the Court of Appeal case of *Structural Concrete Sdn Bhd v. Wing Tieh Holdings Bhd* [1997] 1 CLJ 300, at 306, as follows:

Exercises of judicial discretion are not judicial precedent because they are only authority for the facts of the particular case.

55. *Secondly, Order 28 rule 4(3) and (4) and Order 38 rule 2(2) RC do not lay down any consideration, let alone a "prime consideration", to be taken into account by the court in the exercise of its discretion regarding Court Enc. No. 29. This is understandable as the court's discretion under Order 28 rule 4(3) and (4) and Order 38 rule 2(2) RC, in my opinion, should not be fettered.* I rely on the High Court judgment by Raja Azlan Shah J (as His Royal Highness then was) in *Gomez v. Gomez* [1969] 1 MLJ 228, at 228 and 230, as follows

This case raises the singularly important question as to whether a person other than the deponent to an affidavit can be cross-examined. Order 38 rule 1 [RSC] provides that "a judge may, on the application of either party, order the attendance for cross-examination of the person making any such affidavit".

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These cases [on cross-examination of deponents] are not to be read as laying down rules of universal application. If once it were taken as settled, then there is no room for the exercise of discretion but a rule of law is substituted for it. The power given by Order 38 rule 1 is obviously a matter of discretion to be exercised in accordance with well-known judicial principles.

(emphasis added)

I am mindful of Tengku Baharudin Shah JCA's majority judgment of the Court of Appeal in *Tetuan Kumar Jaspal Quah & Aishah* (which laid down the "3 prime considerations"). It must be pointed out that in *Tetuan Kumar Jaspal Quah & Aishah* –

- A (a) Tengku Baharudin Shah JCA held as follows, at p. 653-654 -
- [32] *In the second place, an application to the registrar for a review of taxation does not require affidavit evidence unless the court permits. Since no direction to admit any evidence had been made by the court, any application for cross-examination on affidavit is irrelevant and in any case premature.* The distinction between O. 38 r. 2(3) RHC and its predecessor O. 31 r. 1 RSC seems to have escaped the attention of the parties. The significant difference is the addition of the underlined words in the present rule as follows:
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- C ...
- The addition of the last batch of words above must necessarily mean that in the situation now prescribed i.e. where 'these rules otherwise provides' and where 'the court otherwise directs', evidence may not be given by affidavit. An application for review of taxation is made under O. 59 r. 34 RHC which is a rule that provides otherwise in that r. 34(3) does not require any affidavit to be filed nor evidence to be adduced. It merely provides for the applicant for a review to 'deliver to the registrar objections in writing specifying by a list the items or parts of items the allowance or disallowance of which or the amount allowed in respect of which is objected to and stating concisely the nature and grounds of the objection in each case'. It is only on reviewing the decision on any item that r. 35 empowers the registrar, if he should think fit or desirable, to receive further evidence or exercise all other powers which he might exercise on an original taxation. *Accordingly, until the court deems it fit to require further evidence for the purpose of review any affidavit filed would be irrelevant to the proceedings.*
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- (emphasis added)
- G It is clear that *Tetuan Kumar Jaspal Quah & Aishah* concerns the High Court's revision of the Senior Assistant Registrar's taxation of costs under the then applicable RHC and this does not require affidavit evidence. Hence, the application to cross-examine the deponent in *Tetuan Kumar Jaspal Quah & Aishah* is not necessary and the *dicta* regarding the "3 prime considerations" in *Tetuan Kumar Jaspal Quah & Aishah*, in my respectful opinion, is merely *obiter*; and
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- (b) Zaleha Zahari JCA (as Her Ladyship then was) was the other majority judge in *Tetuan Kumar Jaspal Quah & Aishah*. Her Ladyship did not refer to the "3 prime considerations" and decided in *Tetuan Kumar Jaspal Quah & Aishah*, at p. 655-656, as follows -
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- [42] *I am in agreement with the decision of the learned judge that the issue can be decided without reference to any cross-examination and that a decision can be made from the contemporaneous documents in the court file in order to arrive at a decision on the matters in issue.*

The proposed cross-examination as to whether the appellant's firm or Vijay Kumar Natarajan himself was appointed to represent the respondent is at the best, of little relevance and the cross-examination was rightly refused as the contemporaneous records from the court file would clearly show the names of counsel from the appellant's firm who conducted the hearing of the applications in issue.

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(emphasis added).

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56. Thirdly, the court should be slow to grant leave for cross-examination of a deponent in an interlocutory matter. This is understandable as cross-examination of a deponent in an interlocutory application, will inevitably delay the disposal of the interlocutory application and this in turn, will ultimately delay the final disposal of the case. I cite the following High Court cases (in chronological order):

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- (a) Lim Beng Choon J decided as follows in *Balwant Singh Purba v. R Rajasingam* [1987] CLJ (Rep) 468, at 469 -

This is an application made by the plaintiff for leave pursuant to O. 38 r. 2(3) [RHC] to cross-examine the defendant in respect of the affidavit made by him in support of his application to set aside the interim injunction granted by this Court on 18 December 1986. I dismissed this application after hearing the submissions of Counsel of the respective parties.

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For purpose of this judgment I need only mention two of the principles. The first one is mentioned in the following passage appearing at p. 592 of the English Supreme Court Practice [1979] Vol. 1:

There is a discretion as to ordering cross-examination on affidavits filed on interlocutory applications. Cross-examination upon affidavits sworn in applications for interlocutory injunctions is very rare.

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The second principle is that the power as conferred by the said O. 38 r. 2(3) can be invoked only in respect of an issue which the Court is asked to determine in the interlocutory proceeding and not in respect of any other issue which should be determined at the trial of the action proper.

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(emphasis added);

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- (b) *Syarikat Tungaring Kilang Papan Sdn Bhd v. Sabah Forest Industries Sdn Bhd & Ors* [1990] 2 MLJ 38, at 39, concerned an application to cross-examine 2 deponents of affidavits filed in respect of an interlocutory injunction application. In *Syarikat Tungaring Kilang Papan Sdn Bhd*, at p. 42, Haidar J (as His Lordship then was) followed Lim Beng Choon's judgment in *Balwant Singh Purba*; and

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A (c) in *SAP (M) Sdn Bhd & Anor v. I World HRM Net Sdn Bhd & Anor* [2006] 2 MLJ 678, at 683-684, Vincent Ng J (as His Lordship then was) held as follows -

B [14] In an application for interim injunction the court is only required to determine whether there are serious issues to be tried. The court is not required to make a decision on the merits of the case at this stage. *Leave to cross-examine a deponent of affidavit in interim injunction should be sparingly granted as it would allow the parties to have a rehearsal before the trial and such rehearsals could have an oppressive effect.*

C [15] *I would hold that the granting of leave to cross-examine a deponent of affidavit in interim injunction would in effect be allowing a fine tooth comb examination of affidavit evidence even at the interlocutory proceeding stage. This would result in the opening of flood gates which would allow the defendants to adopt delay tactics in future interim injunction applications and should be avoided.*

D [16] At the interim injunction stage the court is not required to go into minute details. The test is simply whether there are serious issues to be tried based on the affidavit evidence.

E [17] *In both Balwant Singh Purba v. R Rajasingam [1996] 2 MLJ 549 and Syarikat Tunggarang Kilang Papan Sdn Bhd v. Sabah Forest Industries Sdn Bhd [1990] 2 MLJ 38 on applications for interim injunction the court refused leave to cross-examine. It was stated that cross-examination upon affidavit sworn in application for interlocutory injunction is very rare. Also cross-examination can only be evoked in respect of an issue which the court is asked to determine in the interlocutory proceeding and not in respect of any other issue which should be determined at the trial of the action proper.*

F [18] I am of the view that the defendants at this stage of the proceedings should not be allowed to cross-examine the deponent to test the veracity of the witness because this will actually go to the merits of the case. To allow the defendants, at this early stage of the proceedings, to cross-examine when an urgent injunction is sought, would only have the effect of delaying the prompt determination of the merits of the application for injunction - perhaps this was the intention of the defendants, who in any event is not precluded from, filing further affidavits to counter assertions in the plaintiffs' affidavits that were sought to be impugned.

(emphasis added)

I 57. *Fourthly, an applicant for leave to cross-examine a deponent bears the legal burden to persuade the court to exercise its discretion to grant leave.* This is clear from the Tengku Baharudin Shah JCA's majority judgment of the Court of Appeal in *Tetuan Kumar Jaspal Quah & Aishah*, at p. 649, as follows:

[18] *It was the appellant's contention, relying on an extract from the High Court judgment in Gomez v. Gomez [1969] 1 MLJ 228, that the onus is on the respondent to show why cross-examination should not be allowed which in this case the respondent has failed to do. It was also contended that only in exceptional cases should the judge refuse an application to cross-examine a deponent on his affidavit – see Collin LJ in Comet Products UK Ltd v. Hawkex Plastics Ltd & Anor [1971] 2 QB 67 at p 77.*

[19] *With respect, I do not think these are correct statements of the law in this country.*

(emphasis added).

58. *Fifthly, in respect of an originating summons for final relief, the following factors should be considered by the court in the exercise of its discretion to allow or not the cross-examination of a deponent:*

(a) *the application to cross-examine a deponent should be made in good faith.*
Any such application should not be made -

(i) based on *mala fide*; or

(ii) for an improper or collateral purpose to -

(1) delay proceedings; or

(2) harass, intimidate and/or oppress the deponent and/or opposing party.

The following High Court cases demonstrate the need for a *bona fide* application for leave to cross-examine a deponent -

(i) *Salleh Abas FJ (as His Lordship then was and sitting as a High Court judge) held as follows in Leisure & Allied Industries Pty Ltd v. Udaria Sdn Bhd [1980] 1 MLJ 189, at 190 -*

To allow or not to allow the respondent's application to cross-examine the appellant's witnesses upon their affidavits, I take it, is a matter of court's discretion. In appropriate circumstances, there is no reason why such application should be refused merely because the deponent is a foreigner living outside the jurisdiction (Re Lucas [1952] 1 All ER 102); "otherwise foreigners would have an advantage" (Strauss v. Goldschmidt 8 SLR 239). It is really a matter of common sense and an elementary legal principle that a party who swears an affidavit must be prepared to stand up to it by cross-examination unless the application to cross-examine him is without just cause vexatious or motivated by desire to delay the proceedings (Allen v. Allen [1894] P 239). In view of the appellant's application for judgment under Order 32 Rule 6, I am not, however, prepared to hold the respondent's application to

- A *cross-examine the appellant's witnesses as being without just cause or motivated by desire to delay the proceedings or without bona fide or sham or vexatious.*
- (emphasis added); and
- B (ii) in *Emporium Jaya (Bentong) Sdn Bhd v. Emporium Jaya (Jerantut) Sdn Bhd (No 2)* [2002] 5 MLJ 675, at 685, Ramly Ali J (as His Lordship then was) decided as follows -
- C *In order to enable me to exercise my judicial discretion as regards the present applications made by the applicants in the present case, it is necessary for me to see how the proposed cross examination would be relevant to the issue in the petition. An examination of this issue is therefore essential in order to enable me to determine whether the applications are made 'without just cause, or motivated by desire to delay proceedings or without bona fide or sham or vexatious'.*
- D (emphasis added);
- E (b) *relevant issue(s) for cross-examination should be sufficiently identified by the applicant [Identified Issue(s)]. This is to ensure that the proposed cross-examination does not constitute a harassment, intimidation and/or oppression of the deponent and/or opposing party. This consideration is stated in the following cases -*
- F (i) Siti Norma Yaakob FCJ's (as Her Ladyship then was) judgment in the Court of Appeal case of *Indrani a/p Rajaratnam & Ors v. Fairview Schools Bhd* [2001] 4 MLJ 56, at 61 (concurring by KC Vohrah JCA, at p. 62 and 64-65); and
- G (ii) Tengku Baharudin Shah JCA's majority judgment of the Court of Appeal in *Tetuan Kumar Jaspal Quah & Aishah*, at p. 651;
- H (c) *there must be a conflict in affidavit evidence in respect of the Identified Issue(s) so as to necessitate a cross-examination of the deponent in question. The truth of the averment in an affidavit must be challenged. Once again, I rely on Tengku Baharudin Shah JCA's majority judgment of the Court of Appeal in Tetuan Kumar Jaspal Quah & Aishah, at p. 651;*
- I (d) *the cross-examination should advance the cause of justice. The cause of justice is not advanced when a conflict in affidavit evidence may be resolved by undisputed contemporaneous documents. I cite the following cases -*
- (i) Tengku Baharudin Shah JCA's majority judgment of the Court of Appeal in *Tetuan Kumar Jaspal Quah & Aishah*, at p. 651; and
- (ii) Anuar J's (as His Lordship then was) judgment in the High Court case of *Kumagai Gumi Co Ltd v. Zenecon-Kumagai Sdn Bhd & Ors and Another Application* [1994] 2 MLJ 789, at 799; and

- (e) I am of the respectful view that there is no “condition” that an application to cross-examine a deponent should be made “at the earliest stage possible as is practicable” (as submitted by the 1st to 4th and 6th Defendants). Having said that, *there should not be any unreasonable delay in applying to cross-examine a deponent. If there is any delay in such an application, there must be an adequate and reasonable explanation on affidavit evidence for such a delay.* In *Indrani a/p Rajaratnam*, at p. 62, an application to cross-examine a deponent had been dismissed on the ground of, among others, delay.
- (emphasis added)

Court Encl. No. 91 Has Not Been Made In Good Faith

[10] I am of the view that court encl. no. 91 has not been filed in good faith and on this ground alone, court encl. no. 91 should be dismissed – please see the High Court’s judgments in *Leisure & Allied Industries Pty Ltd* (at p. 190) and *Emporium Jaya (Bentong) Sdn Bhd* (at p. 685). My decision is premised on the following reasons:

- (a) if the second to fourth and sixth defendants had genuinely wished to cross-examine the four deponents, they should have filed an application to cross-examine the four deponents upon receipt of court encl. no. 29 (cross-examination of first defendant). This was however not done;
- (b) the fourth defendant affirmed an affidavit on 26 January 2015 (court encl. no. 36) to oppose court encl. no. 29. Paragraph 1 of court encl. no. 36 stated that court encl. no. 36 had been affirmed not only for the fourth defendant but also for the first to third and sixth defendants. Court encl. no. 36 averred the following matters in opposing court encl. no. 29:
- (i) the fourth defendant verily believed that “not all the disputed allegations are “serious” as alleged or material to the first to third plaintiffs’ purported case” (para. 7);
- (ii) the fourth defendant verily believed there was sufficient affidavit evidence and contemporaneous documents before this court to decide the disputed issues identified by the plaintiffs to cross-examine the first defendant (paras. 12.1, 14.1, 14.2 and 16.3);
- (iii) the fourth defendant verily believed “nothing further” would be gained from the cross-examination of the first defendant (paras. 12.2, 14.3, 16.4 and 18);
- (iv) the fourth defendant verily believed that some of the allegations made by the first defendant which the plaintiffs wanted to cross-examine, were “collateral and not central” to this case (paras. 14.5, 16.6 and 28); and

- A (v) the cross-examination of the first defendant would “only serve to protract and delay” the hearing of this case and result in additional costs and waste of valuable time (para. 31).
- (First set of affirmed allegations)
- B The first set of affirmed allegations clearly evidences a lack of good faith on the part of the second to fourth and sixth defendants in filing court encl. no. 91;
- (c) on 19 May 2015, the fourth defendant affirmed a corrective affidavit (court encl. no. 72). Court encl. no. 72:
- C (i) had been affirmed not only for the fourth defendant but also on behalf of the second, third and sixth defendants (para. 1);
- (ii) referred to, among others, court encl. no. 36 (para. 4.24); and
- (iii) corrected other affidavits affirmed by the fourth defendant but did not correct court encl. no. 36.
- D Court encl. no. 72 would be a good opportunity for the second to fourth and sixth defendants to correct or withdraw the first set of affirmed allegations but this was not done. In fact, the first set of affirmed allegations has not been withdrawn at any time by any one or all of the second to fourth and sixth defendants. On or before the filing of court encl. no. 91, the second to fourth and sixth defendants should have withdrawn the first set of affirmed allegations. Such an omission by the second to fourth and sixth defendants fortifies the inference of lack of *bona fides* on the part of the second to fourth and sixth defendants in filing court encl. no. 91;
- E
- F (d) Court encl. no. 91 is supported by an affidavit affirmed by the fourth defendant on 17 June 2015 (court encl. no. 92). According to court encl. no. 92:
- G (i) court encl. no. 92 has been affirmed on behalf of the second to fourth and sixth defendants (para. 1);
- (ii) court encl. no. 92 refers to, among others, court encl. no. 36 (para. 4.19) and court encl. no. 72 (para. 4.30);
- H (iii) the fourth defendant verily believed court encl. no. 91 was “*bona fide* in nature” and was “not frivolous or intended to delay the proceedings”, bearing in mind that the first defendant had to be cross-examined first before the OS could be disposed of (paras. 9.5, 21, 32 and 37);
- I (iv) the fourth defendant verily believed that “in light of (decision on 15 May 2015)”, the cross-examination of the four deponents:
- (1) would be “necessary for the just and fair determination of the issues” in the OS (paras. 9.2, 9.4, 21, 32 and 37);

- (2) would not unfairly prejudice the plaintiffs (paras. 9.3, 21, 32 and 37); and A
- (3) is supported by the “balance of convenience” (paras. 9.7, 21, 32 and 37);
- (v) the fourth defendant verily believed that if court encl. no. 91 was dismissed, there would be irreparable prejudice and injustice to the second to fourth and sixth defendants (paras. 9.6, 21, 32 and 37); B
- (vi) the fourth defendant stated that court encl. no. 91 was not made earlier because the second to fourth and sixth defendants had been advised by their solicitors that the OS could be heard and disposed of by way of affidavit evidence (para. 40 of court encl. no. 92). Upon the decision dated 15 May 2015, the second to fourth and sixth defendants then instructed their solicitors to file court encl. no. 91 (para. 41 of court encl. no. 92); and C
- (vii) the fourth defendant verily believed that due to the “considerable number and length of the various affidavits” filed in this case, “time was taken to identify the paragraphs of the plaintiffs’ affidavits that needed to be cross-examined” (para. 42) D
- (Second set of affirmed allegations). E
- Paragraphs 40 and 41 of court encl. no. 92, in my opinion, are the true reasons for the filing of court encl. no. 91. Court encl. no. 91 is not filed based on the relevant considerations discussed in the various cases as explained in *Charles Koo Ho Tung (No 1)* but is instead filed by the second to fourth and sixth defendants as a “tactical counter-measure” to delay specifically the enforcement of the decision dated 15 May 2015 and generally, the disposal of the OS. Accordingly, court encl. no. 91 has been made by the second to fourth and sixth defendants for an improper and/or collateral purpose. I will discuss later in this judgment about the unexplained and inordinate delay on the part of the second to fourth and sixth defendants in filing court encl. no. 91; F
- (e) the many contradictions between the first set of affirmed allegations with paras. 9.2 to 9.7, 21, 32 and 37 of court encl. no. 92, support the inference that court encl. no. 91 has not been made in good faith; G
- (f) the first to fourth and sixth defendants had presented a lengthy written submission to oppose court encl. no. 20 (submission against court encl. no. 29). The submission against court encl. no. 29, contended, among others, as follows: H
- (i) court encl. no. 29 had not been made “at the earliest stage possible as is practicable”; I
- (ii) the plaintiffs had filed court encl. no. 29 based on *mala fide*;

- A (iii) the court should only exercise its power to order the cross-examination of a deponent of an affidavit if the following “three prime considerations” are cumulatively fulfilled:
- B (1) the truth of the averments in the first defendant’s affidavits as specified by the plaintiffs, had been challenged by the plaintiffs;
- (2) relevant issues of fact had been identified by the plaintiffs; and
- (3) the first defendant’s cross-examination should only be allowed if the disputed facts were relevant to the issues to be decided in the OS;
- C (iv) the first defendant’s cross-examination would not advance the cause of justice; and
- (v) the first defendant’s cross-examination should be refused because there was sufficient affidavit evidence and contemporaneous documents.
- D The submission against court encl. no. 29 is clearly contrary to the second set of affirmed allegations which purportedly support court encl. no. 91. Such an inconsistency supports the inference that the second to fourth and sixth defendants lack good faith in filing court encl. no. 91;
- E (g) almost immediately after the decision dated 15 May 2015 had been pronounced in court, the then learned counsel for the first to fourth and sixth defendants orally applied to stay the effect of the decision dated 15 May 2015 (oral stay application) pending an appeal by the second to fourth and sixth defendants to the Court of Appeal against the decision dated 15 May 2015 (appeal against decision dated 15 May 2015). The appeal against decision dated 15 May 2015 was subsequently filed on 29 May 2015 (the first defendant did not file an appeal to the Court of Appeal against the decision dated 15 May 2015).
- F If there was good faith on the part of the second to fourth and sixth defendants in filing court encl. no. 91, the second to fourth and sixth defendants would not have instructed their learned counsel to make the oral stay application. Such an instruction would have to be given prior to the decision dated 15 May 2015. If the second to fourth and sixth defendants were *bona fide* in filing court encl. no. 91, they would have immediately instructed their solicitors to file court encl. no. 91 after the decision dated 15 May 2015 was given. However, this was not the case; and
- G
- H
- I (h) court encl. no. 91 was filed on 19 June 2015, after the filing of the appeal against decision dated 15 May 2015 (lodged on 29 May 2015). If the second to fourth and sixth defendants had filed court encl. no. 91 in good faith, they should have instructed their solicitors to withdraw the appeal against decision. To the contrary, the second to fourth and

sixth defendants proceeded with the appeal against decision dated 15 May 2015. The Court of Appeal subsequently dismissed the appeal against decision dated 15 May 2015.

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I must make clear that I am not disputing the right of the second to fourth and sixth defendants under s. 67(1) of the Courts of Judicature Act 1964 to lodge the appeal against decision dated 15 May 2015. The fact that the second to fourth and sixth defendants had filed the appeal against decision dated 15 May 2015 and yet, they subsequently filed court encl. no. 91 and proceeded with the appeal against decision dated 15 May 2015, showed a lack of *bona fides* on the part of the second to fourth and sixth defendants in making court encl. no. 91.

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Second To Fourth And Sixth Defendants Are Estopped From Filing Court Encl. No. 91

[11] Malaysian courts have recognised the wide application of the estoppel doctrine as illustrated in Gopal Sri Ram JCA's (as he then was) judgment in the Federal Court case of *Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Bhd* [1995] 4 CLJ 283, at p. 294, as follows:

D

The time has come for this Court to recognise that the doctrine of estoppel is a flexible principle by which justice is done according to the circumstances of the case. It is a doctrine of wide utility and has been resorted to in varying fact patterns to achieve justice. Indeed, the circumstances in which the doctrine may operate are endless.

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(emphasis added)

[12] I now refer to Lord Bridge's judgment (concurrent by Lord Diplock, Lord Fraser, Lord Roskill and Lord Brightman) in the House of Lords case of *Langdale v. Danby* [1982] 3 All ER 129, which has applied the estoppel doctrine in the context of steps taken by one party in legal proceedings. The facts of *Langdale* are different from this case but *Langdale* illustrates that a party in a contentious matter may be estopped from relying on a certain position in the case if the party has earlier conducted his or her case in a manner contrary to that position. I rely on the following judgment of Lord Bridge in *Langdale*, at p. 140:

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As I see it the direct result of the conduct of Mr Danby's case before Oliver J was to permit the Langdales to obtain summary judgment. They then spent nearly two years in time and a great deal of money in costs in the course of enforcing that judgment. True it is that part, but part only, of the costs so incurred could be and were set off against the balance of the purchase price of the cottage due to Mr Danby, probably Mr Danby's only significant resource. But now, if the Court of Appeal judgment were to stand, the Langdales would face a full scale trial against a legally-aided defendant in which, though they succeeded, they would have little prospect of recovering any of their costs. Looking at this history in a common sense way, it seems to me beyond argument that the Langdales will have acted to their detriment, on the faith of the conduct of Mr Danby's case which enabled them to obtain summary judgment, by spending large sums to enforce that judgment, if they are now denied the benefit of it by allowing Mr Danby to set up a case which conflicts radically with

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A *the case presented on his behalf before Oliver J. Independently of any other ground I would, therefore, hold Mr Danby estopped from arguing the case on which he succeeded in the Court of Appeal.*

(emphasis added)

B [13] Based on the reasons explained in the above sub-paras. 10(a) to (h), I have no hesitation to estop the second to fourth and sixth defendants from proceeding with court encl. no. 91 in view of their conduct in respect of court encl. no. 29 (especially the first set of affirmed allegations which have yet to be withdrawn, submission against court encl. no. 29, oral stay application and appeal against decision dated 15 May 2015).

C **Unexplained Excessive Delay In Making Court Encl. No. 91**

D [14] If there is an unreasonable delay in applying to cross-examine a deponent of an affidavit and such a delay has not been adequately explained in the applicant's affidavit, this is a ground in itself to dismiss the cross-examination application – I refer to the judgments of Siti Norma Yaakob JCA (as she then was) (at pp. 61-62) and KC Vohrah J (as he then was) (at pp. 65-66) in the Court of Appeal case of *Indrani*.

[15] In deciding whether there is excessive delay in the filing of court encl. no. 91, the following provisions in RC are relevant:

E (a) Order 34 rule 9 RC provides as follows:

Duty to make all interlocutory applications at pre-trial case management

Order 34 rule 9

F (1) *Any party to whom the notice to attend pre-trial case management addressed shall so far as practicable apply at the first pre-trial case management for any order or directions which he may desire as to any matter capable of being dealt with on an interlocutory application in the action and shall, not less than seven days before the first pre-trial case management date, serve on the other parties a notice in Form 60 specifying the orders and directions sought.*

G (2) *If the pre-trial case management is adjourned and any party to the proceedings desires to apply at the resumed pre-trial case management for any order or directions not asked in any notice given under paragraph (1), he shall, not less than seven days before the resumed pre-trial case management date, serve on the other parties a notice in the manner prescribed in paragraph (1) specifying those orders and directions sought in so far as they differ from the orders and directions asked for during the first pre-trial case management.*

H (3) Any application subsequent to the pre-trial case management and before judgment as to any matter capable of being dealt with on an interlocutory application in the action shall be made by a notice of application.

I (emphasis added)

By virtue of O. 34 r. 9(1) and (2) RC, all parties have a mandatory “duty” to make all interlocutory applications during pre-trial case management (such as applications to cross-examine deponents of affidavits). I rely on the following judgment by Zaki Azmi CJ in the Federal Court case of *Blue Valley Plantation Bhd v. Periasamy Kuppannan & Ors* [2011] 5 CLJ 481, at p. 492; [2011] 5 MLJ 521, at p. 529:

[15] *The courts do not encourage parties to delay making any interlocutory application because by delaying such applications the final decision of the court will also be delayed. It had been the practice of some plaintiffs or defendants to wait until the last minute to file all sorts of interlocutory applications. Today the Malaysian courts are discouraging these practices. Parties, particularly now, should not delay proceedings by filing interlocutory applications when the substantive hearing can be fixed by the trial courts early. ... These expedition [sic] disposals have been proven by the practice of our New Commercial Courts and the New Civil Courts, where there are close monitoring of actions filed in that court and cases targeted to be completed within a year from filing.*

[16] *The Court of Appeal and this court (including any appellate court) abhor appeals in respect of interlocutory applications when issues raised in such application could be finally heard and disposed in the main suit. To me, seeking for certain interlocutory orders are sometimes merely delaying tactics taken up by a party who do not have a strong case. In some cases, delaying tactics can be taken up by a party to tire out his opponent with a view to forcing that opponent to an unfair settlement, delay can cause injustice to a party particularly when he has a strong case. ...*

(emphasis added)

The use of the imperative word “shall” (and not the permissive term “may”) in O. 34 r. 9(1) and (2) RC, indicates the intention of the Rules Committee to give mandatory effect to O. 34 r. 9(1) and (2) RC. In *PP v. Yap Min Woie* [1995] 4 CLJ 692; [1996] 1 MLJ 169, at 172-173, the Federal Court gave effect to the mandatory term “shall” in ss. 12 and 28 of the then applicable Juvenile Courts Act 1947; and

- (b) the court’s power to order cross-examination of a deponent of an affidavit in O. 28 r. 4(3) and (4) RC is “without prejudice to the generality” of O. 28 r. 4(2) RC. Order 28 r. 4(2) RC provides that the court “shall give such directions as to the further conduct of the proceedings as it thinks best adapted to secure the just, expeditious and economical disposal thereof”. Accordingly, the court’s discretionary power to order cross-examination of a deponent of an affidavit in O. 28 r. 4(3) and (4) RC does not prejudice the court’s mandatory duty to ensure that the OS is disposed of justly, expeditiously and economically.

A [16] I accept the plaintiffs' contention that there has been unreasonable delay in the filing of court encl. no. 91 by the second to fourth and sixth defendants. This decision is premised on the following two reasons (two reasons):

B (a) the OS had been filed on 15 August 2014. By filing court encl. no. 91 on 19 June 2015, a delay of more than ten months from the date of the filing of the OS, the second to fourth and sixth defendants had breached the mandatory duty imposed by O. 34 r. 9(1) and (2) RC to file expeditiously all interlocutory applications during pre-trial case management – please see the Federal Court's judgment in *Blue Valley Plantations Bhd*; and

C (b) court encl. no. 29 was filed on 19 December 2014. The second to fourth and sixth defendants could have easily “tagged along” court encl. no. 29 and file an application to cross-examine the four deponents. Both matters could be justly, expeditiously and economically disposed of in accordance with O. 28 r. 4(2) RC. This was not done by the second to fourth and sixth defendants. Instead, the second to fourth and sixth defendants embarked on a vigorous opposition to court encl. no. 29 and only filed court encl. no. 91 after the decision dated 15 May 2015 went against them. Such an intentional and excessive delay on the part of the second to fourth and sixth defendants is contrary to a just, expeditious and economical disposal of the OS as mandated by O. 28 r. 4(2) RC.

D [17] In view of the two reasons, I am not able to accept the following “excuses” proffered by the second to fourth and sixth defendants for the delay in making court encl. no. 91:

F (a) the hearing of the OS had not been fixed;
(b) this court only allowed court encl. no. 29 on 15 May 2015;
(c) advice from the solicitors for the second to fourth and sixth defendants that the OS could be disposed of by way of affidavit evidence (para. 40 of court encl. no. 92); and

G (d) as there were many affidavits which were lengthy, time was needed to ascertain the identified issues for the cross-examination of the four deponents.

H (Four excuses)

I [18] In addition to the two reasons, there is a third reason why the four excuses are untenable. As explained in the above para. 10, there are sufficient grounds to justify an inference that court encl. no. 91 has not been filed in good faith as court encl. no. 91 is intended to delay specifically the enforcement of the court's decision dated 15 May 2015 and generally, the disposal of the OS.

[19] I have not overlooked O. 1A (the court shall have regard to the overriding interest of justice in administering RC, including O. 28 r. 4(2) RC and O. 34 r. 9(1) and (2) RC) and O. 2 r. 1(2) (RC are a procedural code subject to the overriding objective of enabling the court to deal with cases justly). The above interpretation of O. 28 r. 4(2) RC and O. 34 r. 9(1) and (2) RC is in consonance with the interest of justice to ensure that an application to cross-examine the deponent of an affidavit, is made expeditiously in good faith and is not filed for an improper or collateral purpose.

[20] In view of the three above reasons, the four excuses could not explain, let alone justify, the inordinate delay of the second to fourth and sixth defendants in filing court encl. no. 91.

Second To Fourth And Sixth Defendants Have Failed To Discharge Burden To Satisfy Exercise Of Judicial Discretion In Favour Of Court Encl. No. 91

[21] All the cases cited by learned counsel for the second to fourth and sixth defendants can be distinguished from court encl. no. 91 on one or more of the three following grounds:

- (a) there is a lack of good faith on the part of the second to fourth and sixth defendants in filing court encl. no. 91 (please see the above para. 10);
- (b) as explained in the above paras. 11 to 13, by reason of a certain course of conduct of this case by the second to fourth and sixth defendants, the second to fourth and sixth defendants are estopped from succeeding in court encl. no. 91; and/or
- (c) there has been an unreasonable delay on the part of the second to fourth and sixth defendants in making court encl. no. 91 which cannot be explained in view of the above three reasons (please see the above paras. 14 to 20).

[22] The Court of Appeal's judgment in *HSBC Bank's* case delivered by Nik Hashim JCA (as he then was) concerned an application to amend a defence and did not involve an application for leave to cross-examine a deponent of an affidavit.

[23] *M/s Harsh Wood Products Pvt Ltd* is a decision of the Madhya Pradesh High Court which is based on O. 19 r. 2 (O. 19 r. 2 (India)) in the First Schedule to the Indian "Code of Civil Procedure 1908" (CPC (India)). Order 19 r. 2 (India) provides as follows:

Power to order attendance of deponent for cross-examination

- (1) Upon any application evidence may be given by affidavit, but the Court may, at the instance of either party, order the attendance for cross-examination of the deponent.
- (2) Such attendance shall be in Court, unless the deponent is exempted from personal appearance in Court or the Court otherwise directs.

- A Order 19 r. 2 (India) is materially different from our O. 28 r. 4 and O. 38 r. 2 (regarding the court's power to order cross-examination of a deponent of an affidavit). Furthermore, there is no provision in CPC (India) which is equivalent to O. 34 r. 9 RC (which imposes a mandatory duty on parties to make interlocutory applications during pre-trial case management). As such,
- B I am of the respectful view that Indian cases on CPC (India) regarding the court's power to order cross-examination of a deponent of an affidavit, should be read with caution.

- [24] As decided in *Charles Koo Ho Tung (No 1)*, at para. 55, whether a court orders or not the cross-examination of a deponent of an affidavit in a case,
- C is an exercise of the court's discretion dependent on the particular facts of the case and judgments on the exercise of such a discretion cannot constitute binding legal precedents from the view point of the *stare decisis* doctrine.

- [25] As held by Tengku Baharudin Shah JCA in the majority judgment of the Court of Appeal in *Tetuan Kumar Jaspal & Quah*, at p. 649, the second
- D to fourth and sixth defendants bear the legal burden to persuade this court to exercise its discretion to allow court encl. no. 91. In view of the above reasons given in paras. 10 to 20, I find that the second to fourth and sixth defendants are unable to discharge their legal burden to persuade me to exercise judicial discretion to grant court encl. no. 91.

- E **Costs For Court Encl. No. 91 Should Be Paid Forthwith By Second To Fourth And Sixth Defendants To Plaintiffs**

[26] Order 59 r. 7(1) RC reads as follows:

- F Costs may be dealt with by the Court at any stage of the proceedings or after the conclusion of the proceedings; and *any costs ordered shall be paid at the conclusion of the proceedings unless the Court otherwise orders.*
- (emphasis added)

- [27] Order 59 r. 1(3) RC has provided a definition of "costs paid forthwith" as "the plaintiff or defendant, as the case may be, shall be entitled to his costs of that part of the proceedings in respect of which such an order is made, notwithstanding that the cause or matter has yet to be tried".
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[28] The previous O. 59 r. 4(1) of the Rules of the High Court 1980 (RHC) provided as follows:

- H Costs may be dealt with by the court at any stage of the proceedings; or after the conclusion of the proceedings and *any order of the court for the payment of any costs may, if the court thinks fit, require the costs to be paid forthwith notwithstanding that the proceedings have not been concluded.*
- (emphasis added)

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[29] The preponderance of Malaysian cases on O. 59 r. 4(1) RHC, has taken the following approach (contrary to the position in English law) (first approach):

- (a) generally, costs of an interlocutory application should be paid at the conclusion of the proceedings; and
- (b) there are exceptional circumstances wherein the court may order costs to be paid forthwith (before the conclusion of the proceedings).

[30] The first approach is reflected in the following cases:

- (a) in *Hai Yue Hin v. Public Feedmill (M) Sdn Bhd* [1997] 4 CLJ 555, at pp. 558-559; [1997] 3 MLJ 730, at pp. 733-734, Shaik Daud JCA decided as follows in the Court of Appeal:

Learned counsel for the appellant cited two English authorities in support of her contention that the proper interpretation of O. 59 r. 4(1) [RHC] is that when the court ordered costs to a party even in an interlocutory matter, such costs are to be paid forthwith, and not after the conclusion of the proceedings. The heavy reliance on these two cases is because the English Order which governs this is O. 62 r. 4(1) which is in *pari materia* with our O. 59 r. 4(1). In *Adam & Harvey Ltd v. International Maritime Supplies Co Ltd* [1967] 1 All ER 533, it was held that in an interlocutory matter orders for costs to be taxed made without stating 'forthwith' confers a right to immediate taxation. In *Allied Collection Agencies Ltd v. Wood & Anor* [1981] 3 All ER 176, it was held (at p 176):

Where on an interlocutory application, the court intends that one party is to have the costs of that application irrespective of the outcome of the substantive action, the usual form of order is 'costs in any event', in which case the taxation is deferred until the conclusion of the substantive action. The words 'defendant's costs' and the words 'plaintiff's costs', which are only used in exceptional circumstances, have the effect of entitling the party concerned to obtain an immediate taxation.

Learned counsel for the appellant urged upon us to follow these two English authorities, especially when the English Order on the issue is in *pari materia* with our O. 59 r. 4(1). She also cited an unreported decision of Shankar J (as he then was) in *East Asiatic Co (M) Bhd v. Kilang Papan Aman Sdn Bhd* in Kuala Lumpur High Court Civil Suit No 2157 of 1985.

That case also concerns the dismissal by the senior assistant registrar of an interlocutory application with costs. When an application for taxation of the costs came up before the senior assistant registrar and, on an objection by the respondent, the learned senior assistant registrar ordered that the bill should only be taxed at the conclusion of the trial. On appeal, Shankar J (as he then was) following the decisions in *Adam & Harvey Ltd* and *Allied Collection Agencies Ltd* held that:

- A Upon consideration of these authorities, I am left in no doubt now that the only interpretation of the registrar's order, 'dismissed with costs' is that the costs were to be taxed and paid forthwith.
- B *On reading of O. 59 r. 4(1), we find that the intention of this rule is as clear as day. The rule itself indicates that the question of costs is left to the discretion of the court and also provide that the court 'may, if the court thinks fit require the costs to be paid forthwith'. Surely, these words must mean what they say. If the court thinks it fit, the court itself would order the costs to be paid forthwith and in the absence of such an order, it should follow the general rule of interlocutory proceedings and the costs should only be paid after the conclusion of the proceedings. This interpretation does not seem to be a novel one, as some 30 years ago Smith J in Chow Yong Hong v. Chow See Lim & Anor [1959] MLJ 23 held (at p. 24) that:*
- C *The proceedings are purely interlocutory and should follow the general rule of interlocutory proceedings and that costs should be settled at the end of the action.*
- D *In interpreting O. 59 r. 4(1), the operative words must be 'may, if the court thinks fit'. If the judge finds evidence sufficient to justify an order of costs to be paid forthwith, then if he thinks it fit, he would make such an order. For instance in dismissing an application for summary judgment under O. 14, if there is evidence to suggest that the plaintiff, in the opinion of the judge, knew that the defendant relied on a contention which would entitle them to unconditional leave to defend, then the judge could and should, in our opinion, order that the costs be paid forthwith. The decision in Chow Yong Hong was adopted by Mohamed Dzaiddin J (as he then was) in Ko Ko Ma Pony Horse Centre v. Rasa Sayang Beach Hotels (Pg) Bhd [1990] 1 MLJ 304. In dismissing an interlocutory application by the defendant, the court ordered costs to the plaintiff without adding the word 'forthwith'. The learned judge held that where the proceedings were purely interlocutory, the general rule was that costs of the proceedings should be settled at the end of the action. The court further ordered that the costs of interlocutory proceedings should only be made payable forthwith or in any event when the party against whom the order has been made has been guilty of oppressive or unreasonable conduct, or the party has taken unnecessary or improper action.*
- E *Having given our utmost consideration to the arguments and the authorities cited, we agree and adopt the interpretation given in the two decisions in Chow Yong Hong and Ko Ko Ma Pony Horse Centre, as being the more proper and true interpretation of O. 59 r. 4(1). To hold otherwise would make nonsense of the wording of the Order itself which, as stated earlier, is clear as day. It is only when the court thinks it fit to order the costs to be paid by the plaintiff forthwith that it should be so paid, otherwise it should follow the general rule in interlocutory proceedings and be paid only at the conclusion of the action.*
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- H
- I (emphasis added);

(b) Kamalanathan Ratnam J's decision in the High Court case of *Dato' Abdullah Hishan Mohd Hashim v. Sharma Kumari Shukla (No 2)* [1999] 4 CLJ 184; [1999] 4 AMR 3823, at pp. 3826-3827; and

(c) the judgment of Abdul Aziz Abdul Rahim JC (as he then was) in the High Court case of *Drilltech Oilfield Services Ltd & Anor v. Witech Sdn Bhd* [2003] 1 LNS 339; [2003] 6 MLJ 650, at pp. 656-657.

[31] A second approach follows English cases (second approach). The second approach is illustrated in Gopal Sri Ram JCA's (as he then was) judgment in the Court of Appeal case of *Skrine & Co v. MBf Capital Bhd & Anor And Other Appeals* [1998] 3 CLJ 432, at pp. 462-463, as follows:

We now come to the question of costs. Raja Aziz Addruse has argued that his client ought to have had the amendments in the first place. We agree with him. But, if that had happened, his client would have had to pay the costs. The fact that he succeeds in this appeal does not put him in a better position as far as costs are concerned. *We have examined the decisions of the English Court of Appeal in four unreported cases made available to us by counsel for the plaintiffs. They are Calvin Cader Mackenzie v. Business Magazines (UK) Limited & Ors (CA 18 January 1996), Carmen Proetta v. Times Newspapers Limited (CA 27 February 1991), Thomas Michael Bower v. Ian Robert Maxwell (CA 8 May 1989) and Edelman v. Times Newspapers Limited & Anor. (CA 17 January 1991).*

We do not agree with Raja Aziz that the rule in those cases should not be applied here. Counsel says there was no delay in applying for the amendment. Again we do not agree. The facts relevant to the question of delay and lack of bona fides of the first defendant's application have been dealt with by the learned judge in his judgment and we do not propose to deal with them here. Late amendments must always be discouraged. We will follow the practice adverted to in the English cases. Although the appeal succeeds, the plaintiffs will have all the costs occasioned by the amendment to be taxed and paid forthwith.

(emphasis added)

[32] I am in favour of the first approach based on the wording of O. 59 r. 4(1) RHC. Furthermore, the Court of Appeal in *Skrine & Co* was not referred to O. 59 r. 4(1) RHC and its own earlier decision in *Hai Yue Hin*.

[33] The present O. 59 r. 7(1) RC, in my view, has given effect to the first approach – as a general rule, costs of interlocutory proceedings shall only be paid at the conclusion of the proceedings unless the court orders costs to be paid forthwith (exception). Order 59 r. 7(1) RC does not prescribe the circumstances for the application of the exception. I am of the opinion that the court's discretion to invoke the exception is unfettered and needless to say, the exercise of such a discretion is based purely on the particular facts of the case in question.

- A [34] In view of the inference that court encl. no. 91 has been filed without good faith for an improper and/or collateral purpose (please see the above para. 10), I exercise my discretion under O. 59 r. 7(1) RC to order costs of court encl. no. 91 to be paid forthwith by the second to fourth and sixth defendants to the plaintiffs notwithstanding that the OS has yet to be concluded.
- B

Conclusion

- [35] Premised on the above reasons, I am constrained to dismiss court encl. no. 91 with costs to be paid forthwith by the second to fourth and sixth defendants to the plaintiffs.
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